STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1161

Free Minnesota Small Business Coalition, et al.,
Appellants,

vs.

Tim Walz,
Respondent.

Filed April 26, 2021
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CV-20-3507

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellants)

Keith Ellison, Attorney General, Liz Kramer, Solicitor General, Christina M. Brown, Thomas S. Madison, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Larkin, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellants challenge the district court's denial of their petition for a writ of quo warranto and dismissal of their claims contesting respondent-governor's declaration of a

peacetime emergency and issuance of emergency executive orders. Appellants argue that the governor's creation of criminal penalties in his executive orders violates the separation-of-powers doctrine, that the statute under which the governor exercised his emergency powers creates an unconstitutional legislative veto, and that the district court erred by concluding that the state-legislator appellants do not have standing to pursue the petition. We conclude that appellants forfeited their argument regarding criminal penalties because they did not raise it in the district court and that appellants' legislative-veto claim is not justiciable. We therefore do not consider the merits of those arguments, which renders the issue of state-legislator standing immaterial. We affirm.

FACTS

This appeal stems from respondent Minnesota Governor Tim Walz's use of peacetime emergency powers and issuance of executive orders during the COVID-19 pandemic. Appellants are the Free Minnesota Small Business Coalition, several individual businesses in Minnesota, and several members of the Minnesota Senate and Minnesota House of Representatives.

On March 13, 2020, the governor declared a peacetime emergency based on the COVID-19 pandemic. The governor then issued numerous executive orders based on the peacetime emergency. By the end of May 2020, the governor had issued over 60 such emergency executive orders. Those orders closed public schools; closed bars, restaurants, and other places of public accommodation; and prohibited Minnesotans from leaving their homes except for certain activities. In Emergency Executive Order 20-63, the governor extended the closure of certain places of public accommodation and imposed significant

restrictions on businesses. He also ordered that any willful violation of that executive order is a misdemeanor offense and that a business owner's requirement or encouragement of an employee to violate that executive order is a gross-misdemeanor offense.

On May 28, 2020, appellants petitioned for a writ of quo warranto, alleging that the governor had exceeded his legal authority. Appellants sought to enjoin the governor from enforcing his emergency executive orders and from issuing new orders. Appellants argued that the executive orders violate the separation-of-powers doctrine because they constitute exercises of pure legislative authority; that Minn. Stat. § 12.31, subd. 2 (2020), establishes an unconstitutional legislative veto; and that Minn. Stat. § 12.31, subd. 2, does not authorize the governor to invoke emergency powers for public-health purposes. The district court ordered the governor to show cause why the court should not grant appellants' petition for a writ of quo warranto. Shortly afterward, the governor moved the district court to dismiss appellants' action for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e) and for lack of subject-matter jurisdiction under Minn. R. Civ. P. 12.02(a).

The district court denied appellants' petition for a writ of quo warranto and granted the governor's motion to dismiss for failure to state a claim. In doing so, the district court concluded that the petitioning members of the Minnesota Senate and Minnesota House of Representatives do not have standing to pursue the petition. This appeal follows.

DECISION

The governor declared a peacetime emergency and issued related executive orders under the Minnesota Emergency Management Act of 1996 (MEMA), Minn. Stat. §§ 12.01-

.61 (2020). Under MEMA, the governor may declare a peacetime emergency "only when an act of nature, a technological failure or malfunction, a terrorist incident, an industrial accident, a hazardous materials accident, or a civil disturbance endangers life and property and local government resources are inadequate to handle the situation." Minn. Stat. § 12.31, subd. 2(a).

"When the governor declares a peacetime emergency, the governor must immediately notify the majority and minority leaders of the senate and the speaker and majority and minority leaders of the house of representatives." *Id.* A peacetime emergency must not last more than five days unless the Executive Council extends it for up to 30 days. *Id.* "The Executive Council consists of the governor, lieutenant governor, secretary of state, state auditor, and attorney general." Minn. Stat. § 9.011, subd. 1 (2020).

The legislature may terminate a peacetime emergency extending beyond 30 days by a majority vote of each house. Minn. Stat. § 12.31, subd. 2(b). If the governor determines a need to extend the peacetime emergency beyond 30 days and the legislature is not in session, then the governor must immediately convene both houses. *Id.*

The Executive Council approved the governor's initial declaration of a peacetime emergency and extended it to 30 days. Since then, the governor has repeatedly extended the peacetime emergency after the expiration of 30 days, and the Executive Council has approved its extension each time. The legislative houses have had opportunities to produce the majority votes necessary to terminate the peacetime emergency in both regular and special legislative sessions. But the legislature has not done so.

Appellants sought relief from the governor's peacetime-emergency executive orders by petitioning the district court for a writ of quo warranto. A writ of quo warranto is used to "challenge official action not authorized by law." *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 174 (Minn. 2020). It is "designed to test whether a person exercising power is legally entitled to do so." *State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 614 n.1 (Minn. 1995) (quotation omitted). "The writ requires an official to show before a court of competent jurisdiction by what authority the official exercised the challenged right or privilege of office." *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 318 (Minn. App. 2007). As recently as May 2020, the Minnesota Supreme Court refused to abolish the common-law writ of quo warranto. *Save Lake Calhoun*, 943 N.W.2d at 176. The supreme court reasoned that "[t]he underlying reason for the writ—to rein in government officials who exceed their constitutional or statutory authority—remains as valid as ever." *Id.*

A petition for a writ of quo warranto may be dismissed for "failure to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02(e); *see Save Lake Calhoun*, 943 N.W.2d at 175 (reviewing district court's dismissal of a petition for a writ of quo warranto for failure to state a claim upon which relief could be granted). We review such a dismissal de novo. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). We "accept the facts alleged in the [petition] as true and construe all reasonable inferences in favor of the nonmoving party." *Id.* But we are not bound by legal conclusions in a petition. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008). "[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the

pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted).

Appellants challenge the district court's dismissal of their petition for a writ of quo warranto. They raise three primary issues on appeal: (1) whether the governor's creation of criminal penalties in his executive orders violates the separation-of-powers doctrine, (2) whether the statute under which the governor exercised his emergency powers creates an unconstitutional legislative veto, and (3) whether the district court erred by concluding that the state-legislator appellants do not have standing to pursue the petition. We turn to those issues.

I.

Appellants contend that MEMA violates the separation-of-powers doctrine. The separation-of-powers principle is embodied in article III of the Minnesota Constitution, which states: "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." Minn. Const. art. III, § 1.

Minn. Const. art. III, § 1, includes three elements: a distributive clause that identifies the three branches; a prohibitive clause that prevents one branch from exercising the powers of another branch; and an exception clause, which allows one branch to exercise another type of power when the constitution expressly provides for it. *State ex rel. Patterson v. Bates*, 104 N.W. 709, 712 (Minn. 1905). "Together, these clauses create not

merely a separation of functions, but also, importantly, a balance of powers among the branches of our government." *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 629 (Minn. 2017) (Anderson, J., dissenting). "[E]ach branch has areas of autonomy and also has available certain tools to check another branch from exceeding its power. A proper balance of powers among the branches is what secures the separation of those powers." *Id.*

Under the nondelegation doctrine, the legislature "cannot delegate purely legislative power to any other body, person, board, or commission." *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949). Purely legislative power is "the authority to make a complete law—complete as to the time it shall take effect and as to whom it shall apply—and to determine the expediency of its enactment." *Id.* A law does not delegate purely legislative power if it "furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies." *Id.* at 538-39. The nondelegation doctrine applies to the Minnesota Legislature through the separation-of-powers provision of our state constitution. Minn. Const. art. III, § 1; *see also Rukavina v. Pawlenty*, 684 N.W.2d 525, 535 (Minn. App. 2004) (citing article III of the constitution when discussing the delegation of legislative power), *review denied* (Minn. Oct. 19, 2004).

Appellants' briefs to this court focus solely on the governor's creation of criminal penalties in his executive orders as the basis for their separation-of-powers claim, arguing that "[m]aking acts criminal or creating criminal laws is a purely legislative action." They point to Emergency Executive Order 20-63, in which the governor ordered that any willful violation of the executive order is a misdemeanor and that a business owner's requirement

or encouragement of an employee to violate the executive order is a gross misdemeanor. They argue that "nothing under § 12.21, subdivision 3 grants the Governor the authority to make actions criminal or to create criminal laws as he has done so in his Executive Orders." The governor responds that appellants' argument regarding the imposition of criminal penalties is not properly before this court because it was not raised or addressed in district court.[1]

"A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Furthermore, an appellant may not "obtain review by raising the same general issue litigated below but under a different theory." *Id.*

> [T]he theory of the judicial system in this state is that the parties shall have first a decision of the court below, and then a review of that decision in this court. The very nature of its jurisdiction confines this court to a consideration of such questions as, originating in another court, have been there actually or presumably considered and determined in the first instance. The rule applies whether the question is one of fact or of law.

In re Judicial Ditch No. 1, 167 N.W. 124, 125 (Minn. 1918) (citation omitted). "The modern caselaw makes it abundantly clear that, as a general rule, if an appellant fails to

[1] The governor also argues that the legislature, and not the governor, established the challenged criminal penalties, noting that MEMA provides: "Unless a different penalty or punishment is specifically prescribed, a person who willfully violates a provision of this chapter or a rule or order having the force and effect of law issued under authority of this chapter is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed $1,000, or by imprisonment for not more than 90 days." Minn. Stat. § 12.45.

preserve an argument or issue in district court proceedings, the issue or argument is forfeited and may not be asserted in an appellate court." *Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 43 (Minn. App. 2014).

In district court, appellants did not argue that the governor's creation of criminal penalties in Emergency Executive Order 20-63 violates the separation-of-powers doctrine. Instead, appellants argued that the governor's restrictions on businesses and individuals themselves were unauthorized exercises of legislative power. Appellants also argued that MEMA is unconstitutional because it provides no legal standard or legislative guidance for the governor's issuance of executive orders during a peacetime emergency. To be clear, although appellants referenced Emergency Executive Order 20-63 in their petition for a writ of quo warranto in district court, they did not challenge the governor's creation of criminal penalties or argue that the governor had violated the separation-of-powers doctrine by authorizing those penalties.

The district court rejected the arguments that appellants did make, concluding that MEMA provides a reasonably clear standard by which the governor may declare a peacetime emergency. Appellants do not address that ruling on appeal.[2] Instead, they raise

[2] At oral argument before this court, appellants indicated that they were raising two claims for this court's consideration. Appellants described the first as a "nondelegation doctrine claim." Specifically, appellants stated that MEMA is a "constitutionally unauthorized delegation of legislative emergency powers" and that "in this legal claim the constitutionality is a matter of the specificity required for a constitutional delegation." Although appellants mentioned a "specificity" challenge at the beginning of their oral argument to this court, they did not argue it further. Moreover, appellants did not address that challenge in their briefs to this court. We therefore do not consider it. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that an issue not argued in the briefs is waived).

the same general issue—whether the governor violated the separation-of-powers doctrine—under a new theory based on the governor's creation of criminal penalties for violation of his emergency executive orders.

On "rare occasions" appellate courts have allowed a party in a civil case to raise an issue for the first time on appeal. *Roth v. Weir*, 690 N.W.2d 410, 413-14 (Minn. App. 2005) (quotation omitted) (discussing factors favoring appellate review and exercising discretion to address issues raised for first time on appeal). But appellants have not articulated a basis for this court to depart from its general rule that "if an appellant fails to preserve an argument or issue in district court proceedings, the issue or argument is forfeited and may not be asserted in an appellate court." *Doe 175*, 842 N.W.2d at 43.

We acknowledge appellants' frustration with the governor's executive orders and the economic harm those orders have caused. But this court must follow the law. Indeed, it would be troubling for this court to ignore rules limiting the issues that it may consider on appeal in an effort to reach an unpreserved claim that another co-equal branch of government exceeded its authority. In sum, appellants' separation-of-powers challenge to the governor's creation of criminal penalties for violation of his executive orders is not properly before this court. We therefore do not determine the merits of that issue.

II.

Appellants contend that Minn. Stat. § 12.31, subd. 2(b), creates an unconstitutional legislative veto. That provision permits the legislature to terminate a peacetime emergency extending beyond 30 days "[b]y majority vote of each house of the legislature." Minn. Stat. § 12.31, subd. 2(b). According to appellants, the statute violates the Presentation

Clause of the Minnesota Constitution, which requires bills passed by the legislature to be presented to the governor. *See* Minn. Const. art. IV, § 23. Additionally, appellants contend that MEMA is not severable and that all of Minn. Stat. § 12.31, subd. 2, is therefore unconstitutional, including the provision authorizing the governor to declare a peacetime emergency. The governor argues that appellants' constitutional challenge to Minn. Stat. § 12.31, subd. 2(b), is not justiciable because the legislature has not terminated the peacetime emergency under that section and that appellants therefore lack standing to assert that claim.

Before a Minnesota court can determine the constitutionality of a statute, a justiciable controversy must exist. *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996). To establish the existence of a justiciable controversy, litigants must show "a direct and imminent injury which results from the alleged unconstitutional provision." *Id.* (quotation omitted). Questions of justiciability are issues of law that we review de novo. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011).

The concept of standing is a component of justiciability that involves who may bring a particular claim. *Id.* at 338. "Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). Parties acquire standing when they suffer an "injury-in-fact" or when the legislature confers standing by statute. *Id.* The purpose of the standing requirement is "to ensure that issues before the courts will be vigorously and adequately presented." *Id.* (quotation omitted).

It is undisputed that the Minnesota Legislature has not voted to terminate the peacetime emergency under Minn. Stat. § 12.31, subd. 2(b). Thus, appellants have not suffered an injury-in-fact stemming from application of Minn. Stat. § 12.31, subd. 2(b). Indeed, the injuries that appellants describe result from the governor's peacetime-emergency executive orders, and not from a legislative vote to terminate the peacetime emergency under Minn. Stat. § 12.31, subd. 2(b). Because appellants have not suffered an injury-in-fact stemming from application of Minn. Stat. § 12.31, subd. 2(b), they lack standing to challenge that provision, and their constitutional challenge to that statute is not justiciable. We therefore do not determine the merits of that issue.

III.

Finally, appellants contend that the district court erred by determining that the state-legislator appellants do not have standing to pursue the underlying petition for a writ of quo warranto. Specifically, appellants contend that those legislators have standing as individual taxpayers.

Again, standing requires a party to have a sufficient stake in a justiciable controversy. *Id.* When the facts are undisputed, the question of standing is a question of law that we review de novo. *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007).

Although appellants separately argue that the district court erred in determining that the state-legislator appellants lack standing in this matter, and although standing is generally addressed as a threshold issue, we need not address the standing issue here because the claims that the state-legislator appellants seek to advance on appeal are not properly before this court. Simply put, the merits of appellants' constitutional claims are

not properly before this court, and we therefore decline to consider them. Thus, a determination whether the state-legislator appellants have standing to pursue those claims would not affect the relief available to those appellants in this appeal. We therefore do not determine the merits of that issue. *See State ex rel. Leino v. Roy*, 910 N.W.2d 477, 481 (Minn. App. 2018) (stating that this court does not issue advisory opinions or decide cases merely to establish precedent), *review granted* (Minn. June 27, 2018) *and appeal dismissed* (Minn. May 10, 2019).

Affirmed.